

Served: April 17, 2003



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 17th day of April, 2003

In the matter of the citizenship of

DHL AIRWAYS, INC.

under 49 U.S.C. § 40102(a)(15)

Docket OST-2002-13089

ORDER INSTITUTING FORMAL *DE NOVO* REVIEW

By this order, the Department initiates a *de novo* review of the current citizenship of DHL Airways, Inc. ("DHL Airways"). This review will be conducted before a Department Administrative Law Judge in a formal proceeding pursuant to this order and the Department's procedural regulations, 14 C.F.R. Part 302.

De Novo Review

In late 2000, DHL Airways reported to the Department that it was planning to undergo a reorganization and a substantial change in its ownership whereby it would split into two separate companies: an air carrier, DHL Airways, and a foreign air freight forwarder, DHL Holdings (USA), Inc. ("DHL Holdings").¹ In accordance with the reporting requirements of 14 C.F.R. 204.5, DHL Airways submitted information to the Department about its proposed reorganization. Consistent with its longstanding practice, the Department began an informal continuing fitness review to examine whether the reorganized DHL Airways would be under the actual control of U.S. citizens.

Throughout 2001 and 2002, while the Department was reviewing DHL Airways' reorganization and the issues relating to its citizenship, Federal Express Corporation ("FedEx"), United Parcel Service Co. ("UPS"), and Lynden Air Cargo, LLC ("Lynden") filed complaints, petitions, and pleadings in various public dockets challenging the citizenship of DHL Airways. In its responsive pleadings, DHL Airways argued that it remained a U.S. citizen after it completed its

¹ DHL Holdings is now part of a separate corporation, DHL Worldwide Express, which is now under foreign ownership and control. That foreign ownership includes Deutsche Post, the operator of Germany's national postal service (a partially privatized company with a letter-mail monopoly). DHL Airways is now a separate U.S. airline, majority-owned by Mr. William A. Robinson, a U.S. citizen. DHL Holdings is a minority investor in the airline.

corporate and management restructuring, and it set forth many details about its new corporate structure in support of its position.

During the time the Department was examining this information submitted in the public dockets, the Office of the Inspector General, at the request of Representative Don Young, Chairman of the House Transportation and Infrastructure Committee, began an evaluation of the informal process the Department used in reviewing the citizenship of DHL Airways. On March 4, 2003, the Inspector General issued a written response to Chairman Young. On March 5, 2003, the Department issued a Notice Requesting Comments on the letter from the Inspector General. All parties have filed comments on the issues raised in the IG letter.

In § 2710 of P.L. 108-11, Congress directed the Department to use an Administrative Law Judge (Law Judge) in a formal proceeding to resolve this docket, Docket OST-2002-13089.²

We believe, after reviewing the comments of the interested parties, along with the filings in the several dockets concerning DHL Airways' citizenship, and noting the recommendations of the Inspector General and the comments thereon, that "a fresh start to this important proceeding"³ will best serve the public interest. This proceeding is being instituted to consider *de novo* the current citizenship of DHL Airways only. Other issues will not be made a part of this proceeding.⁴ In accordance with § 2710 of P.L. 108-11, this matter will be set for oral evidentiary hearing before a Law Judge.

Issues and Procedures

The parties to this proceeding before the Law Judge will be those entities already participating in this docket, as well as other parties determined by the Law Judge to qualify for such status under our procedural rules. Although our rules normally permit petitions to intervene any time prior to the first prehearing conference or, if none, any time prior to the hearing, 14 C.F.R. §302.20(c)(2)(i), because of the need to expedite this proceeding, petitions to intervene must be submitted within 15 days of the date of this order.⁵

As noted above, the issue of DHL Airways' citizenship has been pending in various forms for a considerable period of time. A substantial amount of relevant information has already been filed in this docket and it is in the public interest to make every effort to expedite this proceeding and to reduce the burden on all parties involved, while ensuring a full and fair consideration of this

² P.L. 108-11, § 2710; April 16, 2003.

³ Comments of United Parcel Service Co., March 19, 2003, p. 8.

⁴ Issues involving DHL Airways' past compliance with statutory citizenship requirements are the subject of separate third-party formal enforcement complaints and will be considered by the Assistant General Counsel for Aviation Enforcement and Proceedings in a separate proceeding pursuant to rules applicable to such complaints, 14 C.F.R. §302.400, *et. seq.* We do not expect that Office to take formal action on those complaints until it has the benefit of our findings in this proceeding, which may have a bearing on its deliberations.

⁵ Public Counsel will not participate in this proceeding.

matter. We are therefore directing the Law Judge to submit a Recommended Decision to the Department by September 2, 2003.⁶

To facilitate meeting this deadline, we direct that all parties designate, in a filing in this docket (served on all of the parties) within 7 days of issuance of this order, the documents already filed in this docket that they should be included in the record in the proceeding before the Law Judge, and provide the Law Judge with two copies of each such document. Within 14 days of the issuance of this order, the parties shall file and serve objections, if any, to the designations by other parties. The Law Judge will then rule on the relevance and admissibility of the documents designated by the parties. Requests that other documents be included in the record of the proceeding before the Law Judge must also be submitted to the Law Judge for a decision on relevance and admissibility under procedures established by the Law Judge.

As an initial matter, to afford interested parties prompt access to the documents already in this docket under conditions imposed by the Department in similar recent circumstances,⁷ we will grant immediate interim access to all documents covered by any Rule 12 motion (14 C.F.R. §302.12 (d)(3)) to counsel and outside experts for interested parties who file appropriate affidavits with the Department in advance, unless the party filing the motion objects. Those parties who have already filed affidavits in this docket need not file new affidavits in the docket, but shall provide the Law Judge copies of the existing affidavits. Consistent with our practice in earlier proceedings, parties will be permitted to make copies of documents at the Dockets facility for use by persons who have filed confidentiality affidavits.⁸ Parties may file motions under 14 C.F.R. §302.12 asking for confidential treatment of subsequent materials submitted in this docket. We also find it appropriate to grant interim access to any subsequent materials that may be filed in this docket under a Rule 12 motion to counsel and outside experts for interested parties who file appropriate affidavits with the Department in advance, unless the party filing the motion objects.

All affidavits must state, at a minimum, that (1) the affiant is counsel for an interested party or an outside independent expert providing services to such a party and shall identify that party; (2) the affiant will use the information only for the purpose of participating in this proceeding; and (3) the affiant will disclose such information only to other persons who have filed a valid affidavit in Docket OST-2002-13089. Affiants and interested parties must understand and agree that any pleading or other filing that includes or discusses information contained in the covered document must itself be accompanied by a Rule 12 motion requesting confidential treatment. Affidavits must be filed in Docket OST-2002-13089 with the Department of Transportation, Dockets,

⁶ If the Law Judge determines that additional time is needed to complete this proceeding, he may request an extension of time from the DOT Decisionmaker.

⁷ See Notices in Dockets OST-2002-11842 dated March 21, 2002, and OST-2001-10429 dated August 21, 2001.

⁸ See Notice dated March 21, 2002, Docket OST-2002-11842 (Delta-KAL-Air France-Alitalia-CSA request for approval of and antitrust immunity for Alliance Agreements); Notice dated September 11, 2001, Docket OST-2001-10387 (American Airlines-British Airways request for approval of and antitrust immunity for an Alliance Agreement).

Room PL-401, 400 Seventh Street, S.W., Washington, D.C., 20590, with a copy to the Law Judge.

Affiants may examine the documents at the Department of Transportation at the Dockets location. Affiants must present a date-stamped copy of the affidavit filed with the Department of Transportation before examination of the documents. All persons who have filed confidentiality affidavits in this proceeding are hereby directed to file, within 7 days after (1) the expiration of the 60-day period within which a person may petition for judicial review of our final decision in this docket or (2) the completion of any judicial review of that final decision, a further affidavit stating that all copies of the document have either been destroyed or returned to the Department of Transportation.

Outstanding Motions

There are several motions pending that we will dispose of at this time.

On March 26, FedEx filed an Emergency Motion of Federal Express for Rescission. In it, FedEx requests that the Department rescind the May 1, 2002, opinion by the Department's staff that DHL Airways remained a U.S. citizen. DHL Airways filed an answer opposing the request. We have decided to deny FedEx's request. We find no need to formally vacate the May 1, 2002, letter because the determination reached in the proceeding we are instituting today will supersede any prior determinations by the Department on this issue.

On March 26, UPS filed a motion asking us to consider a transaction involving DHL Worldwide Express and ABX Air, Inc. (ABX) either in this docket, or in the alternative, in a separate public docketed proceeding. Answers opposing this request have been filed by DHL Airways and DHL Worldwide Express. We have decided to dismiss this request as premature. Section 204.5 of our Regulations (14 C.F.R. §204.5) requires air carriers proposing a substantial change in operations, ownership, or management to file data with the Department in advance of completing such a change. To date, we have no such filing before us. If and when we receive a filing from ABX, we will decide how to proceed.

On March 14, UPS filed a contingent motion for leave to file an otherwise unauthorized document and answer of UPS. DHL Airways has filed a reply, and UPS has filed a Surreply, each accompanied by a motion for leave to file.⁹ UPS asks the Department to release for public viewing all documents and other materials presented to the Department during the course of its informal review of the citizenship of DHL Airways. We have decided to dismiss this request as moot. In light of our action here, the Law Judge will determine what documentation is relevant and necessary to determine the sole issue in this proceeding, which is the current citizenship of DHL Airways.

ACCORDINGLY,

⁹ We grant the motions for leave to file.

1. We initiate a *de novo* review of the current citizenship of DHL Airways, Inc., to be conducted before a Department Administrative Law Judge in a formal proceeding pursuant to this order and the Department's procedural regulations, 14 C.F.R. Part 302.
2. We direct the Administrative Law Judge assigned this proceeding to submit a Recommended Decision in this case to the Department by September 2, 2003.
3. Petitions to intervene in this proceeding by persons not already parties will be due 15 days from the service date of this order.
4. The Emergency Motion of Federal Express for Rescission is denied.
5. The Motion of United Parcel Service Co. dated March 26, 2003 is dismissed.
6. We grant the Contingent Motion of United Parcel Service Co. for Leave to File an Otherwise Unauthorized Document and Answer of United Parcel Service Co., and the Motions for leave to file further responsive documents to that Answer filed by DHL Airways and United Parcel Service Co.
7. We dismiss as moot the relief requested by United Parcel Service Co. in the Answer referred to in the ordering paragraph 6.
8. We will serve a copy of this order on all parties in this docket.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov/search>*